INDEX.

	Page.
STATEMENT OF THE CASE	1–3
BRIEF OF ARGUMENT	3
ARGUMENT	4–35
I. The Government's right of action on the breach was not lost by annulling the contract	4
United States v. *Mc Mullen*, 222 U. S. 460.	
United States v. *O'Brien*, 220 U. S. 321.	
II. The measure of recovery for the breach was the excess cost of completing the work and was not limited by Clause A to liquidated damages	5–20
United States v. *Maloney*, 4 App. Cas. (D. C.) 505.	
The Government had a right to repudiate the contract on common law principles, and is entitled to recover actual damages for the breach	11
Bollman v. *Burt*, 61 Md. 415.	
Cleveland Rolling Mill v. *Rhodes*, 121 U. S. 255.	
Johnson v. *Allen*, 78 Ala. 387.	
Norrington v. *Wright*, 115 U. S. 188.	
Pope v. *Porter*, 102 N. Y. 366.	
III. The defendant surety company was not discharged by the extension of time.	20–29
1. The surety consented in advance to the extension which was granted to the contractor	21, 25
Graham v. *United States*, 231 U. S. 474.	
United States v. *Mc Mullen*, *supra*.	

ARGUMENT—Continued. Page.

2. Even if the surety did not so consent, it was not discharged by the extension, since it suffered no damage thereby ... 21–29

Atlantic Trust & Deposit Co. v. *Town of Laurinburg*, 163 Fed. 690.

Baglin v. *Title Guaranty & Surety Co.*, 166 Fed. 356.

Guaranty Co. v. *Pressed Brick Co.*, 191 U. S. 416 (and other cases cited in brief).

IV. The contract with the Atlantic, Gulf & Pacific Company was competent evidence to show the excess cost of completing the work 29–35

Baer v. *Sleicher*, 153 Fed. 129.

Graham v. *United States*, *supra*, 481.

New York v. *Second Ave. R. R. Co.*, 102 N. Y. 572.

United States v. *Mc Mullen*, *supra*, 471.

CONCLUSION 35

AUTHORITIES CITED.

	Page.
Atlantic Trust & Deposit Co. v. *Town of Laurinburg*, 163 Fed. 690	27
Baer v. *Sleicher*, 153 Fed. 129	35
Baglin v. *Title Guaranty & Surety Co.*, 166 Fed. 356	28
Bollman v. *Burt*, 61 Md. 415	11
Cleveland Rolling Mill v. *Rhodes*, 121 U. S. 255	11
Graham v. *United States*, 231 U. S. 474	19, 25, 29, 35
Guaranty Co. v. *Pressed Brick Co.*, 191 U. S. 416	26
Hill v. *American Surety Co.*, 200 U. S. 197	29
Johnson v. *Allen*, 78 Ala. 387	11
Kennedy v. *United States*, 24 Ct. Cl. 122	7
New York v. *Second Ave. R. R. Co.*, 102 N. Y. 572	35
Norrington v. *Wright*, 115 U. S. 188	11
Pigeon v. *United States*, 27 Ct. Cl. 167	7
Pope v. *Porter*, 102 N. Y. 366	11
Satterlee v. *United States*, 30 Ct. Cl. 31	7
United States v. *Lynch*, 192 Fed. 364	29
United States v. *Maloney*, 4 App. Cas. (D. C.) 505	7, 12
United States v. *Mc Mullen*, 222 U. S. 460	4, 20, 25, 35
United States v. *O'Brien*, 220 U. S. 321	4, 7, 8, 10, 32
United States v. *United States Fidelity & Guaranty Co.*, 178 Fed. 721	29
United States v. *Walsh*, 115 Fed. 697	32
United States Fidelity & Guaranty Co. v. *United States*, 178 Fed. 692	29
Young v. *American Bonding Co.*, 228 Pa. St. 373	29
2 Comp. Dec. 579	7
20 Op. Atty. Gen. 511	7

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

STONE, SAND AND GRAVEL COMPANY AND AMERICAN SURETY COMPANY OF NEW YORK, PLAINTIFFS IN ERROR,
v.
THE UNITED STATES.
No. 302.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The facts are fully and fairly stated in the brief for the plaintiffs in error. One feature of the case, however, requires special emphasis here, namely, the confessed breach of the contract by the contractor and the circumstances under which the contract was annulled by the Government. In this connection the pertinent provisions of the contract are as follows:

> * * * Within six (6) months of notice of award of contract, the contractor will be required to have in active operation a plant of a

capacity of not less than 260,000 cubic yards per month. But he may begin at an earlier date, provided the plant first put in operation shall have a capacity of not less than 65,000 cubic yards per month. (R. 54.)

The said Stone, Sand and Gravel Company shall commence active operation under this contract on or before the fifth day of December, eighteen hundred and ninety-nine (1899), with sufficient force and plant for an output each calendar month of not less than two hundred and sixty thousand (260,000) cubic yards per month, which shall be increased on or before the fifth day of June, nineteen hundred (1900) with sufficient force and plant for an output each calendar month of not less than three hundred and thirty thousand (330,000) cubic yards per month.

Provided, however, That if work shall commence before the date first above written in this paragraph the plant first put in operation shall have an assured capacity of not less than sixty-five thousand (65,000) cubic yards each calendar month, until December 5, 1899, and work shall not begin with less output. (R. 63.)

It thus appears that the contractor was bound to begin work with an equipment of a capacity of not less than 260,000 cubic yards per month not later than December 5, 1899, or it might at its own option begin earlier if its equipment was capable of 65,000 cubic yards per month. The facts disclose that it did neither. On September 1, 1899, work of a purely

experimental character was begun under the permissive clause but not with an equipment of the required capacity (R. 134, 149, 194, 195). Of course, this lack of equipment did not then amount to a breach of contract, as there was no obligation to do any experimental work; but at the same time it did not constitute commencing the work within the meaning of the contract. At the request of the contractor (R. 173–178) the time for the formal beginning was postponed to January 24, 1900 (R. 148, 194). When that date arrived, the contractor had still failed to assemble a plant of the required capacity with which to begin the work (R. 151), and accordingly the contract was annulled, notification to that effect being mailed to the contractor on March 7, 1900 (R. 155).

BRIEF OF ARGUMENT.

I. The Government's right of action on the breach was not lost by annulling the contract.

II. The measure of recovery for the breach was the excess cost of completing the work and was not limited by Clause A to liquidated damages.

III. The defendant surety company was not discharged by the extension of time.

IV. The contract with the Atlantic, Gulf & Pacific Company was competent evidence to show the excess cost of completing the work.

ARGUMENT.

I.

The Government's right of action on the breach was not lost by annulling the contract.

The so-called annulment of the contract was in reality nothing more than a repudiation of it by the Government on common-law principles independently of any provision in the contract, and it follows as of course that the Government's right of action was not lost thereby. The annulment was "merely a ceremony to mark the point of default as a preliminary to employing some one else." But even if it be conceded that the annulment took place only by reason of Clause A in the contract, the argument of the defendants in the Circuit Court of Appeals that such action operated as a technical rescission *ab initio* is untenable. That argument is not repeated here, and indeed it could not well be, in view of the decisions of this court in *United States* v. *O'Brien*, 220 U. S. 321, and *United States* v. *McMullen*, 222 U. S. 460. It will be sufficient to quote the following passage from the opinion in the *McMullen* case (p. 471):

> The next argument that seems to us to need a word is on the effect of the election of the United States to annul the contract, as it was said. The infelicity of the word annul has been adverted to and its meaning explained heretofore. If notice had been given before

the final breach and abandonment, it would have meant simply that the United States would proceed no further with the contractor under the contract, not that it rescinded or avoided it. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 How. 307, 340. *United States* v. *O'Brien*, 220 U. S. 321, 328.

II.

The measure of recovery for the breach was the excess cost of completing the work and was not limited by clause A to liquidated damages.

Admitting a right of action for breach of the contract in the Government, it is insisted for the plaintiffs in error that the contract limits the measure of recovery to liquidated damages, and that it was therefore error to allow the Government actual damages.

The clause which gives rise to this contention provides (Clause A, R. 63, 64):

> If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to

> annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice [*i. e.*, notice of annulment by the engineer], all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States, and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States.

Toward the end of the contract occurs the following additional provision (Clause B. R. 65):

> It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

The argument is in the main that since Clause B expressly provides for actual damages while Clause A does not in terms do so, the latter clause must be taken as a provision for liquidated damages; and that the annulment here having taken place under Clause A, the Government's recovery is accordingly limited to the reserved percentages as therein provided.

These clauses were used by the Government in its Standard Engineering Contract (Form 19, R. 62) for years, and were again and again construed by courts and administrative officers as providing for a penalty and not liquidated damages.

2 Comp. Dec. 579.
20 Op. Atty. Gen. 511.
Kennedy v. *United States*, 24 Ct. Cl. 122.
Pigeon v. *United States*, 27 Ct. Cl. 167.
Satterlee v. *United States*, 30 Ct. Cl. 31.
United States v. *Maloney*, 4 App. Cas. (D. C.) 505.

This is not and can not be denied. It is contended, however, that this settled construction has been upset by the case of *United States* v. *O'Brien*, 220 U. S. 321, which was decided after the first decision of the Circuit Court of Appeals (177 Fed. 321) in the case at bar had been rendered. In fact, the *O'Brien* case was the sole cause of the second writ of error to the Circuit Court of Appeals, and is frankly relied on here as controlling. The principal question, therefore, is whether that case and the present one are distinguishable.

In the *O'Brien* case the contract (Form 19), containing Clauses A and B, provided that the contractors should begin a work of excavation on March 1, 1899, and complete the same by July 1, 1902. There was no amount of excavation agreed upon as a monthly minimum nor any standard of diligence set up by the contract itself other than the agreement to complete by a day certain. The work was begun on time and continued until January 1, 1901, when the Government annulled the contract under Clause A on the ground that "in the judgment of the engineer in charge" the contractor had failed "to prosecute faithfully and diligently the work in accordance with the specifications of the contract." There was at that time some $8,000 in reserved percentages in the Government's hands, which was retained, and the work having been relet at an excess price amounting to $76,470, suit was brought to recover that sum. It was held that the contract should not be construed as vesting in the engineer in charge absolute discretion as to whether or not a breach had been committed regardless of the facts, and that since it appeared that at the time of the annulment the contractor *might* have completed the work on time, there was no breach in fact, and a recovery was accordingly denied. This was unquestionably the ground upon which the decision was based, as appears from the following passage from the opinion (p. 327):

> * * * In this case it was admitted that there was time enough left to finish the work under the contract when the defendants were

> turned off. It would be a very harsh measure to pronounce the contract broken when but for the prohibition of the United States the defendants might have done the work in time.

No breach having in fact occurred, the Government's right to annul depended entirely upon Clause A, and it was held that the measure of damages applicable to the situation must be found in that clause, which was thus construed by the court (p. 327):

> Again, the later paragraph that we have quoted, giving the right to recover expense of completing the work in excess of the original price, gives that right only "in case of failure * * * to complete this contract as specified and agreed upon." On their face these words mean failure to complete by July 1, 1902, not failure to complete because turned off by the engineer in charge, a year and six months before that time arrived, when competent persons still might do the job. The earlier clause under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due. It is true that the expression of the right to proceed to provide for the completion of the contract and the reference to Rev. Stat., § 3709, hardly belong in that part of the contract unless the defendants are liable for the expense, but the contract does not show technical accuracy enough to give this consideration great weight. If the United States wants more it must say so in plainer words.

In other words, the Government could not recover more than was expressly given by the contract for the infringement of a right dependent for its existence solely upon a special provision of the contract. In the language of the court (p. 328)—

> * * * if the contract were made naught by the Government's election and notice, all rights under it would be at an end, whereas it provides in terms that rights shall arise upon annulment, which *but for this provision in the contract the Government would not have. The suit is upon the contract, but the United States asks more than in our opinion the contract gives.*

The question, therefore, before the court was, What rights did the contract *give?*

In the case at bar, on the other hand, there was admittedly a breach of contract. It is contended, however, that it was not such a breach as would have justified the Government in repudiating the contract without the help of Clause A, and that the Government's rights therefore are wholly dependent upon the contract as in the *O'Brien* case. If the major premise upon which this argument proceeds were sound the *O'Brien* case would undoubtedly be controlling; but it is utterly without foundation. In the instant case there was a complete failure to begin work with the required equipment not only on the original date (December 5, 1899) set out in the contract, but also on a day more than seven weeks later (January 24, 1900), to which the time of commencing work had been postponed through the indulgence of

the Government's representatives. But this is not all. If the contractor had been in a condition of readiness to begin work shortly after the second date it might be plausibly asserted that the breach was not one going to the essence. But, by the admission of its own secretary as a witness in its behalf, the Stone, Sand and Gravel Company could not have been ready to begin work at best for "some three or four months" (R. 137), and the fulfillment of this prophecy was rendered still more remote by the fact that the company went into the hands of a receiver about February 1, 1900 (R. 150). Assuming that Clause A had not been in the contract, can it be seriously contended that the Government would have been obliged to wait until the contract period had expired before reletting the work? Without question such a breach as the present would have been vital to any construction contract, to say nothing of one involving a public work of the greatest importance and urgency. Moreover, both by the letter of the contract and the subsequent conduct of the parties time had been expressly made the essence of the agreement. Upon elementary principles the Government had a right to repudiate the contract and is entitled to recover actual damages for the breach.

Norrington v. *Wright*, 115 U. S. 188.
Cleveland Rolling Mill v. *Rhodes*, 121 U. S. 255.
Johnson v. *Allen*, 78 Ala. 387.
Bollman v. *Burt*, 61 Md. 415.
Pope v. *Porter*, 102 N. Y. 366.

Such being the case, this right of recovery still remains in the Government unless it has been contracted away by Clause A. The situation, then, is just the reverse of what it was in the *O'Brien* case. Instead of the question being, Does the contract *give* the Government an extraordinary right to damages, it is, Does the contract *take away* an ordinary right to damages.

The Government's position is simply this: Where a right to annul exists only by virtue of Clause A, then the sole measure of damage is that prescribed by Clause A, namely, the reserved percentage or money due to the contractor in the hands of the Government; but where the right to annul or repudiate exists independently of Clause A, then the measure of damages therein prescribed has no application, and actual damages may be recovered.

The distinction is illustrated by the *O'Brien* case, *supra*, and the *Maloney* case, *supra*. In the former, as pointed out above, the annulment was for failure to prosecute the work to the satisfaction of the engineer in charge, under circumstances not amounting (as the court held) to a breach of contract. Under these circumstances, the Government's recovery was properly limited to the reserved percentages in its hands, since there could have been no annulment independently of Clause A. In the latter, the annulment was for failure to begin the work on time (just as it was here), which amounted to a breach going to the very essence of the contract, and it was held that

the Government could recover actual damages, because the breach was of a nature which would have justified a repudiation of the contract independently of Clause A. The *Maloney* case was not mentioned in the opinion of this court, in the *O'Brien* case, but was thus distinguished by the Circuit Court of Appeals in the *O'Brien* case (159 Fed. 671, 674):

> It will not be necessary to review in detail the many authorities cited in support of the judgment. Those in which there was *a completed breach* of the contract, and those where the contract did not in terms provide for just what should be the consequences in the event of annulment in advance of the time allowed, are not persuasive here. In one of them *U. S.* v. *Maloney*, 4 App. Cas. D. C. 505, the contract was identical with the one at bar. * * *
>
> In the Maloney Case the contractor wholly failed to do any work whatever. He wholly failed to "commence work on or before the 16th day of June, 1891," which he had expressly agreed to do. *There was a complete breach of the contract before action was taken under the annulment clause.*

The same view was taken in the instant case by the Circuit Court of Appeals in its second opinion, when it thus distinguished the *O'Brien* case from the case at bar (R. 206):

> * * * Analysis of the O'Brien case will disclose that it is clearly distinguishable from the case at bar. In that case there was no breach of contract, and it was held, under

> the facts appearing of record, that the Government could not declare a breach so as to hold the contractors liable in damages for failure to perform. * * *
>
> In the present case there was an utter failure on the part of the contractor to perform his contractual obligations, and the government, on that account, was compelled to relet the contract to other parties. Bearing in mind this distinction we are of the opinion that the ruling, made by this court upon the first writ of error, is not in conflict with the views expressed by the Supreme Court in the O'Brien case.

Our precise contention therefore is that the present case is controlled by the *Maloney* case rather than by the *O'Brien* case. In fact it would be difficult to find two cases more completely "on all fours" with each other than the *Maloney* case and the case at bar. The contracts involved were identical, the breaches sued on were identical, and the measures of damages applied were identical.

The construction of Clause A for which we contend does not, on the other hand, deprive that clause of a legitimate field of operation. If a contractor commits a breach at the threshold of the contract which does not go to the essence, or if he fails to prosecute the work to the satisfaction of the engineer in charge, the clause confers upon the Government the right to annul the contract, to relet the work, if necessary, under section 3709 of the Revised Statutes, and to retain all reserved percentages and money due to the

contractor. These are three rights which the Government would not otherwise have had, and they are also rights for which it would be likely to stipulate; for in no other way could it get rid of a contractor who, though delinquent and incompetent, might not commit a breach going to the essence. For example, if Clause A had not been in the contract in the *O'Brien* case, the Government, by turning the contractor off the job, would have rendered itself liable to him in damages for a breach of contract. But for the very reason that the right of annulment in such a case is conferred by Clause A, its money value is dependent upon the provisions of that clause.

None of these considerations apply to the right of annulment for a breach going to the essence of the contract. That right is inherent in every party to a contract independently of any contract provision, and its money value has been fixed by law for centuries. It is, therefore, exercisable by the Government in this case unless it has been stipulated away by Clause A. We contend that this has not been done for the following reasons:

(*a*) The primary purpose of Clause A, as indicated above, was to vest in the Government an extraordinary right of annulment, and to fix its money value. It would be a strange and unnatural construction to say that that clause at the same time took away from the Government a far more valuable right than it conferred; that it was in effect a double-edged sword

more potent against the party who drew it than him against whom it was drawn.

(*b*) If the Government's recovery is to be limited to all money or reserved percentage due or to become due to the contractor, it follows that the measure of damages in the instant case will be *nil*, since there is obviously no money or reserved percentage due or to become due to a contractor who breaks his contract by failing to even commence work on the specified day.

It is true that here the contractor claimed $6,206.69 which represented the amount which would have become due for its experimental work prior to the time when the regular work was to begin, if that work had measured up to the requirements of contract. This sum was allowed by the court, apparently without contest, as a credit on the amount of the Government's claim. Had the Government seen fit to contest the point it might well have done so, denying the defendants' right to the credit, not by virtue of Clause A, but under another independent provision to the effect that no money should be paid for work which did not measure up to the requirements of contract (R. 65, 66).

But be that as it may, and admitting that in this case the Government had a little money which might have become due to the contractor if the contract had been complied with, still Clause A must be construed in the light of all possible contingencies, and manifestly cases will arise in which there was no pre-

liminary work and hence no money whatever in the Government's hands. In these cases it can not be denied that the construction contended for by the plaintiffs in error would result in not one cent of damages to the Government.

(*c*) The construction urged by the defendants is entirely inconsistent with the two bonds which the Government required of the contractor. One of these was given in connection with the bid, and provided that if the contractor failed to enter into a contract as proposed, he should pay all damages, including those specifically stated as the excess cost of doing the work under a new contract. This would have been an idle ceremony, indeed, if, after the contract had been executed, the contractor was to be at liberty to postpone commencing the work with impunity so far as damages were concerned. The other bond, upon which this suit is brought, was for $75,000 to secure the faithful performance of the contract. Why was this required by the Government, if the performance of the contract could be refused *in limine* without a resulting right to recover a single cent under the bond?

(*d*) No reason is or can be assigned why the Government should have reserved to itself by Clause B the right to recover actual damages for a failure to complete the contract, and yet contracted away by Clause A the right to recover similar damages for breaches at or near the beginning of the contract when the damages would be greater than in the

former contingency. Nor is the fact that Clause B specifically gives actual damages for a failure to complete the work evidence that in that event only would the Government claim such damages. That clause simply declares the ordinary rule of damages for such a breach, and was thus put into the contract out of abundant caution; but because the Government was careful in one part of the contract is no reason for inferring that it was reckless in another.

It thus appears that the construction of Clause A for which we contend, viz, *that it does not apply to breaches going to the essence of the contract*, harmonizes the only two cases in which it has been construed, is consistent with the intention of the parties, and does equity; and, moreover, that it is not inconsistent with the language of the contract nor with the presence of Clauses A and B therein.

It is insisted by the defendants, however, that the annulment, having taken place under Clause A, the measure of damages is accordingly to be governed by that clause. It is true that the letter of the Major of Engineers informing the defendants of the annulment was couched in the language of Clause A; but the decisive point is that the annulment did not depend for its validity upon *any* provision of the contract, but upon the inherent right which the law gives every party to a contract to repudiate it upon a breach by the other party going to the essence thereof. Such being the case, the form of the annulment was immaterial. This is made clear by

the recent case of *Graham* v. *United States*, 231 U. S. 474, in which the Government annulled the contract for a refusal by the contractor to complete the work. It was claimed that the annulment had not been authorized by the proper parties as required by the terms of the contract. The court, however, held otherwise, since it appeared that there had been a plain breach of contract, saying (p. 477):

> * * * The provision as to the annulment, construed in *United States* v. *McMullen*, 222 U. S. 460, 471 and cases cited, referred to the cases where there was a failure to prosecute the work diligently in the judgment of the secretary and allowed a revision of that judgment in cases of that sort, before the United States should decline to proceed further and complete the work by other means. But when Graham refused to go on, there was no question of judgment to be revised but *a plain breach* of the contract unless the refusal was justified, and a right of action accrued *without the need of a ceremony that would have had no meaning or use.*

So in this case the so-called annulment was in reality a repudiation of the contract because of a plain breach, and hence the form in which it was made could not change the rights which accrued to the Government under it. The annulment in the *Maloney* case was also made under Clause A, but since it was unnecessary there to resort to a provision in the contract, just as it was here, the court held

that it did not limit the Government's right to recover actual damages for the breach.

The same principle was applied in *United States* v. *McMullen*, *supra*. There the annulment took place after the time for the completion of the work had expired—*i. e.*, for a plain breach of contract. It was contended that the annulment was equivalent to a rescission which divested the United States of any right to sue on the breach, but the court held that it was nothing more than an ordinary repudiation, saying (p. 471):

> * * * At the time when the notice was given it was merely a *ceremony to mark the point of default as a preliminary to employing some one else*. The obligations of the contract, so far as applicable to a case of default, remained in full force. The United States had a right to get some one else to complete the work and to charge the defendants with the reasonable difference in cost.

III.

The defendant surety company was not discharged by the extension of time.

There is no evidence of any express consent by the surety to the granting of the extension in question, and it is argued that the only extensions contemplated in the contract and the bond were those which might be granted as a result of *unavoidable* delays in the commencement or completion of the work and that to extensions of this character alone had it

consented; that the extension granted to the contractor by the Government in this case was for an avoidable delay, not contemplated in the contract, by which the defendant was discharged from all liability under the familiar rule of *strictissimi juris*.

We contend that this defense must fail for two reasons:

1. The surety consented in advance to the extension which was granted to the contractor.

2. Even if the surety did not so consent, it was not discharged by the extension, since it suffered no damage thereby.

(1) The pertinent provisions of the specifications and the contract proper are as follows:

> Should the time for the completion of the contract be extended, all expenses for inspection, and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor; provided, however, that if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, or because of local or State quarantine restrictions, allow the contractor additional time in writing as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed; provided further, that nothing in these specifications shall affect the power of the party of the first part [the United States] to annul the contract as provided for

in the form of contract adopted and in use by the Engineer Department of the Army. (R. 49.)

* * * provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon. (R. 64.)

The bond for the faithful performance of the contract was conditioned as follows (R. 102):

Now, therefore, if the above bounden Stone, Sand & Gravel Company shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Stone, Sand & Gravel Company, to be observed and performed according to the true intent and meaning of the said contract, *and as well during any period of*

extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue.

The grounds upon which the extension was asked are set forth in a letter from the Stone, Sand & Gravel Co. to Major Willard, the engineer in charge, dated Nov. 25, 1899 (R. 174, 177):

> Owing first to the unavoidable loss of time spent in getting the knowledge of the materials to be excavated and necessary to determine the kind of plant best adapted to the work; secondly to the fact that the dredge building shops of the country were crowded with work beyond all precedent, and to such a degree that none of them would contract and deliver the plant required within the contract time; thirdly, that the mills could not furnish the scows within the required time; and, fourthly, that owing to the prevalence of yellow fever and establishment of quarantine during six weeks, obstructed our work and negotiations for our machinery, it has been and may be impossible for us, in spite of the most energetic efforts which we have made and which is evidenced by the correspondence herewith submitted, to complete the plant necessary to excavate 10,000 yards per day by the 5th of December next.

The extension was presumably granted on some or all of these grounds as appears from the following letter (R. 148):

> UNITED STATES ENGINEER'S OFFICE,
> *Vicksburg, Miss., Dec. 8, 1899.*
>
> Mr. S. V. FORNARIS,
> *Prest. Stone, Sand & Gravel Co.,*
> *Rooms 203 and 205 Cora Building,*
> *New Orleans, La.*
>
> SIR: Your letter of November 25, 1899, applying for extension of time until January 24, 1900, for commencing work with full output, under contract of June 14th, 1899, for excavation for diverting mouth of Yazoo River, was received and forwarded to the chief of engineers, U. S. Army, November 27, with recommendation that the desired extension of fifty days be granted.
>
> My recommendation was approved by the chief of engineers December 2, 1899.
>
> Very respectfully,
> J. H. WILLARD,
> *Major, Corps of Engineers.*

It will be observed that the bond is given to cover "any period of extension of said contract that may be granted on the part of the United States." There is no restriction on this phrase. Apparently the purpose of the surety was to remain bound so long as the contractual relation between the Government and the contractor should endure. If the surety meant to be bound only during such extensions as were provided for on the face of the contract and for

causes therein stated, it should have written its bond accordingly.

It is apparent from the first two clauses of the contract quoted above that the parties contemplated that extensions of time might be granted for *any* delay, the nature of the delay being important only as determining the rights of the parties during the extended period. Thus, if the extension was granted for avoidable delays, certain expenses incident thereto should fall on the contractor; but if it was granted for unavoidable delays, these expenses should fall on the Government. Again, if the contractor failed to commence the work on time or to prosecute it satisfactorily, the Government might annul the contract, but with this proviso, that if the failure was due to unavoidable delays, the right to annul might be waived by the granting of an extension of time.

Both in language and purpose the surety must be held to have consented in advance to the extensions here in question.

United States v. *McMullen, supra.*
Graham v. *United States, supra.*

(2) But even if the defendant should prevail in the contention that its consent to the extension of time can not be implied from the contracts and the bond, it is still possible to negative the effect of the extension on the ground that the defendant, being an incorporated surety company, suffered no damage thereby. The modern doctrine is that the rule of *strictissimi juris* so often invoked by individual

sureties is not applicable to surety companies who carry on the suretyship business for profit, and who are in reality insurers rather than sureties. It is accordingly a well-recognized rule that alterations of the principal obligation, including extensions of time for performance or payment, will not release a surety company, unless it can show that it has been injured thereby.

In *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, the defendant surety company had guaranteed that the obligor would faithfully perform his contract and that he would promptly pay all persons supplying him labor or materials. A material man gave the obligor credit by accepting notes payable in the future, and subsequently brought suit against the surety company, which claimed to be discharged by the extension. The court declined to pass upon the general question whether the rule of *strictissimi juris* is applicable to surety companies, and simply held that owing to the uncertain character of the obligation guaranteed the defendant was not discharged, since there was no proof that it had been damaged by the extension.

Toward the close of the opinion, however, it was said (p. 426):

> The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has

undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor.

In *Atlantic Trust & Deposit Co.* v. *Town of Laurinburg* (C. C. A. 4th C.), 163 Fed. 690, certain material alterations were made in the principal contract by reason of which the defendant surety company claimed to be discharged, although it appeared that the changes were all in favor of the contractor. The court thus disposed of this contention (p. 695):

> * * * Fully recognizing the rule of strictissimi juris as applying to contracts growing out of the ordinary relation of creditor and simple surety, we cannot and do not recognize this rule as applying to contracts written by these bonding corporations, whose business it is (and a profitable one, too, it would seem, from the number organized and existing) to insure, for a monetary consideration, the obligee against a failure of performance on the part of the principal obligor. In such cases, before such bonding company can be released, it must show that the changes made in a contract like this, guaranteed by it, operated injuriously to affect its rights and liabilities.
>
> * * * * *
>
> The very reason for the existence of this kind of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and ex-

> pect losses. If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses, by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them before they can ask to be relieved from contracts which they clamor to execute. In this case no injury, but benefit, came to this defendant from all the changes made, and from the town's guaranteeing the material order and advancing the money for the contracting company to advance and perform the work, and its exceptions because of these are groundless.

In *Baglin* v. *Title Guaranty & Surety Co.* (C. C. Pa.), 166 Fed. 356, 363 (affirmed C. C. A. 3d C., 178 Fed. 682), the same rule was adopted in the following language (p. 363):

> Nor is there any reason to be astute in looking about for flaws that may invalidate the transaction. The defendant is not entitled to the tender consideration that is accorded to an individual surety who is a mere volunteer. Surety companies are not to be so described; they are insurers, paid for their services, bound by contracts which are usually carefully drawn by themselves, and, as a general rule, satisfactorily secured by counter indemnity. They perform a most useful, and indeed, according to modern custom, an indispensable function in the business and legal world,

> but they differ so much from an individual surety of the ordinary type as to render inapplicable some of the reasons that have led the courts to guard the rights of the individual surety with jealous care. * * *

To the same effect are:

Hill v. *American Surety Co.*, 200 U. S. 197, 201.

United States v. *Lynch* (D. C. Del.), 192 Fed. 364.

Graham v. *United States* (C. C. A. 4th C.), 188 Fed. 651, aff'd, 231 U. S. 474.

United States v. *U. S. Fidelity & Guaranty Co.* (C. C. Pa.), 178 Fed. 721.

U. S. Fidelity & Guaranty Co. v. *United States* (C. C. A. 3d C.), 178 Fed. 692.

Young v. *American Bonding Co.*, 228 Pa. St. 373.

There being no allegation nor proof that the extension granted to the contractor in the present case in any way damaged the defendant surety company, it follows that the latter is not discharged even if the extension was granted without its consent.

IV.

The contract with the Atlantic, Gulf & Pacific Company was competent evidence to show the excess cost of completing the work.

Finally, it is claimed by the defendants that even if they are liable for actual damages for the breach of the original contract, the contract with the Atlantic, Gulf & Pacific Company (hereinafter re-

ferred to as the new contract) was inadmissible as evidence of those damages, because it contained certain provisions not found in the original contract, which, as the defendants insist, tended to cause bidders for the work to ask a higher price than would have been asked if the contract had been let under the precise terms of the original contract. The provisions which are particularly complained of are as follows:

(1) The new contract contained two provisions, one in the specifications (R. 108), and another in the articles of agreement (R. 124), by which the contractor bound himself to save the United States harmless against all claims arising out of the infringement of patents caused by work done or materials furnished under the contract. It is true that neither of these provisions or their exact equivalent appeared in the old contract. That instrument, however, contained a provision to the effect that the contractor should be responsible for and pay all liabilities incurred in the prosecution of the work *for labor and material* (R. 65). Inasmuch as he had to furnish all labor and material (R. 62), it is perfectly clear that under the old as well as the new contract he would have been liable for any damage arising from the infringement of patents by such labor and material. The new contract therefore was merely declaratory of what must necessarily have been implied from the old.

(2) The new contract contained a provision not to be found in the old contract, by which the contrac-

tor agreed, in case he failed to complete the contract as specified, to be liable for all cost of inspection and superintendence incurred by the United States during the period of delay (R. 122). But here again the new contract only declared specifically an element of damage which was clearly included in the provision of the old contract (Clause B), by which the Government was given the right, upon a failure by the contractor to complete the work on time, to recover "any or all damages due to such failure," in addition to the excess cost of completion (R. 65). In other words, the old contract provided for actual damages which covered the cost of inspection and superintendence specifically mentioned in the new contract.

(3) While both contracts provided that the decision of the engineer officer in charge as to work done and materials furnished should be final (R. 49, 108), the new contract contained an additional clause by which it was declared that no such decision should be construed as a waiver by the Government of the right to reject any defective work or material (R. 123, 124). Undoubtedly this clause gave the United States a right which it did not have under the old contract, *i. e.*, the right to reverse *any previous* decision approving of defective work and materials; but as a practical matter the change was of minor importance, for even under the old contract the Government could have reversed a favorable decision as to work and materials containing latent defects which could not have been

discovered at the time (*United States* v. *Walsh*, 115 Fed. 697), and decisions of this sort would ordinarily be the only ones which it would wish to reverse. Hence the new clause must have had little or no tendency to raise the bids for the work, especially since it would prove onerous only to contractors who intended to use defective work and materials, and feared ultimate detection by the Government.

(4) The new contract provided that actual damages might be recovered if the contractor failed to commence the work on time or to prosecute it to the satisfaction of the engineer in charge (R. 122, 123), while for like defaults under the old contract it is claimed that only the reserved percentages could be recovered (R. 63, 64). This construction of the old contract has been adopted by this court where there is a failure to prosecute the work satisfactorily (*O'Brien* case, *supra*), it is true; but at the time the Stone, Sand and Gravel contract was made the settled construction was, as pointed out above, that the old contract gave actual damages, or exactly the same damages as the new contract gave when it was executed by the Atlantic, Gulf & Pacific Company. Any attempt, therefore, to disqualify the new contract as evidence on this ground is manifestly futile. Bidders under both forms before the *O'Brien* case must have thought that they would be liable for actual damages in all cases.

On the other hand, the new contract contained the following provisions, which are undoubtedly more

favorable to the contractor than those of the old contract:

(1) The new contract allowed the contractor six months in which to assemble his plant, etc. (R. 121), as against five months and a half under the old contract (R. 62, 63).

(2) The new contract allowed the contractor thirty months within which to complete the work (R. 121), without specifications as to monthly progress, as against twenty-four months at a specified rate of progress each month under the old contract (R. 63). It is stated in the opposing brief that there was no time limit within which the work had to be completed under the old contract; it is true that there was no time limit *qua* time limit expressly mentioned therein, but the same result was reached by requiring the contractor to maintain an average excavation of 260,000 cubic yards per month for the first six months, and thereafter an average of 330,000 cubic yards per month (R. 63), which requirements would cause the work (7,500,000 cubic yards) to be finished in exactly two years. And inasmuch as the contractor was to receive no pay for a month's work below the required amount until he made up the deficiency in a later month (R. 65), it appears that there was a very real time limit.

(3) The new contract contained no such clause as to payments; it authorized monthly disbursements

regardless of the amount of work done, less the regulation ten per cent (R. 112, 124).

(4) The new contract required no guaranty from the contractor to make prompt payments to all persons supplying labor and materials for the prosecution of the work, as the old contract did (R. 63).

(5) The new contract authorized the granting of an extension of time for commencing or completing the work if the delay was caused by epidemics, freshets, ice, local or State quarantine restrictions, or force or violence of the elements (R. 122); while the old contract authorized such extensions if the delay was caused by freshets, ice, or other force or violence of the elements (R. 64).

From the foregoing it is evident not only that the changes in the new contract complained of by the defendants were in all respects unsubstantial, but also that as to plans and specifications, which necessarily have the greatest influence with bidders, the new contract was undoubtedly more favorable to the contractor than was the old. Under these circumstances the remarks of the Circuit Court of Appeals with reference to this feature of the case may well be repeated here (177 Fed. 321, 326):

> We have read and compared the two contracts in question with studious care, and conclude that the defense attempted to be built on variance in their wording is highly artificial and without substance.

It follows, therefore, that the new contract was clearly admissible as representing the reasonable cost of completing the work which the defaulting contractor failed to do.

Graham v. *United States, supra,* 481.
United States v. *McMullen, supra,* 471.
Baer v. *Sleicher* (C. C. A. 6th C.), 153 Fed. 129.
New York v. *Second Ave. R. R. Co.,* 102 N. Y. 572.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

JOHN W. DAVIS,
Solicitor General.

FRANCIS H. MCADOO,
Special Assistant to the Attorney General.
APRIL, 1914.

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